INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 821

UNITED STATES OF AMERICA, APPELLANT

v.

GREATER BUFFALO PRESS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (App. 1691-1706), comprising its findings of fact and conclusions of law, is not yet officially reported.

JURISDICTION

The final judgment of the district court (App. 1706) was entered on May 26, 1970. The notice of appeal (App. 1706) was filed on July 24, 1970. Probable jurisdiction was noted on January 11, 1971 (App. 1707). The jurisdiction of this Court is con-

ferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Continental Can Co.*, 378 U.S. 441; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

QUESTIONS PRESENTED

1. The ultimate question on the merits is whether the acquisition by the leading printer of color comic supplements of a comparably large printer of such supplements violated Section 7 of the Clayton Act. That question, in turn, involves the following subsidiary questions:

a. Whether the district court defined too narrowly the relevant product market by focusing exclusively upon the direct printing competition between the acquiring and acquired firms, and ignoring the substantial competition between the acquiring firm and the sole customer of the acquired firm.

b. Whether the district court erred in ruling that there was no reasonable probability of substantially lessening competition in the color comic supplement printing business because the acquired firm did not itself engage in selling when, at the time of the acquisition, its printing was sold on an exclusive contract basis by its sole customer in competition with the acquiring firm.

c. If the above questions are answered affirmatively, whether the defendant met its burden for establishing a "failing company" defense to the Section 7 charge, where the acquired firm, at the time of the acquisition, (a) had operated for thirty years under

an agreement with its sole customer, which it was in the process of renegotiating, (b) was pursuing expansion plans, (c) had consistently shown after-tax profits and paid large dividends and (d) had sought only one alternative purchaser.

2. If the challenged acquisition violated Section 7, whether divestiture of the acquired firm is appropriate and whether such divestiture should include a subsidiary of the acquiring firm, whose plant was planned by the acquired firm prior to the acquisition and developed with its substantial assistance thereafter.[1]

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

---

[1] Although the "questions presented" in the jurisdictional statement did not specifically include questions 1b and 2 above, we reserved the right to argue those issues if probable jurisdiction were noted. Jurisdictional Statement, p. 22, n. 12.

STATEMENT

A. Introduction

In January 1961, the United States filed a civil antitrust suit charging that the acquisition in 1955 by Greater Buffalo Press, Inc. ("Greater Buffalo") of all the stock of International Color Printing Co. ("International") violated Section 7 of the Clayton Act (App. 4-14). The complaint also alleged that Greater Buffalo, The Hearst Corporation ("Hearst"), acting through its unincorporated division King Features Syndicate ("King"), Newspaper Enterprise Association, Inc. ("N.E.A.") and a co-conspirator had conspired to restrain the sale to newspapers of printing of color comic supplements, in violation of Section 1 of the Sherman Act; that they had conspired to monopolize the sale and printing of those supplements, and that Greater Buffalo had monopolized such printing, in violation of Section 2 of the Sherman Act;[2] and that Hearst and N.E.A. were each parties to tying arrangements involving the licensing of comic features and the sale of color comic supplements, which violated Section 3 of the Clayton Act.

In August 1965, before trial, a consent decree was entered against Hearst, enjoining King generally from entering into any agreement limiting competition in the printing of color comic supplements and from tying the licensing of its comic features with

---

[2] The government eliminated the monopolization charge against Greater Buffalo in its amended complaint filed in 1965 (App. 1597-1608).

the sale of printing of comic supplements (App. 520-524). Although the decree expressly permits King to quote a single price for the licensing of features and the sale of printing, it provides that if a Greater Buffalo plant is divested pursuant to a final judgment in this action, King would then be subject to certain requirements to ensure against tie-ins, including the requirement that it must quote separately its price for licensing and for printing (App. 522). The decree further provides for the court's continuing jurisdiction over King for the purpose of providing such other relief as might be necessary to dissipate the effects of any antitrust violations which might be found against Greater Buffalo (App. 523).

After a full trial on all the issues, the district court found against the government on all charges (App. 1691-1706), and entered judgment dismissing the complaint (App. 1706).[3]

B. The Industry and the Parties

The weekend editions of most newspapers contain the familiar color comic supplements, containing comics, advertising and other features. The rights to

[3] No appeal was taken from the district court's dismissal of the complaint against N.E.A., or its dismissal of the conspiracy claims against Greater Buffalo. The facts relevant to these allegations will be discussed only insofar as they are necessary to an understanding of the circumstances surrounding the challenged acquisition. While we believe that the court below erred in these respects as well as in its disposition of the Section 7 claim, we concluded that, because of the essentially factual basis of the court's judgment on these other claims, they did not present substantial questions warranting further review.

the individual comic features are generally controlled by syndicates. The price for such rights is negotiated between the syndicates and the newspapers, and the rights are granted on a regionally exclusive basis (App. 1018-1020, 1366-1367, 1379).[4] In putting together a supplement, the newspaper may obtain features from different syndicate sources (App. 1017-1018).

While obtaining feature rights for a supplement, the newspaper must simultaneously arrange for its printing. Comic supplement printing requires specially skilled personnel and specially adapted printing equipment. Although newspapers, at least the larger ones, are capable of printing their own supplements, most find that a better quality product can be obtained more economically from independent comic supplement printers (App. 863-864).

Newspapers which do not print their own supplements must arrange to have it done by a color comic supplement printer. Arrangements can be made either directly with the printer or with an intermediary, such as a syndicate or a sales agency, which sells the printing of others in conjunction with its feature-selling business. Prior to selling such printing, the intermediary must, of course, have a commitment from the color comic supplement printer in order to be able to assure the purchasing newspapers that ex-

---

[4] In a group of cases filed while the instant case was under submission, *United States* v. *Chicago Tribune-New York News Syndicate*, *United States* v. *Field Enterprises, Inc.*, and *United States* v. *The Hearst Corporation*, Nos. 67 Civ. 4596-4598, S.D.N.Y., the government is challenging as unreasonable certain of these regional exclusivity provisions. The legality of such exclusivity was not involved in this case.

acting production deadlines—which are the essense of the newspaper business—will be met. Whether its services are sold directly or indirectly, the printer tailors the supplements to the needs of the newspapers and ships them directly to such newspapers (App. 1252, 1334-1338). In arranging for printing, the distance between the printer and the newspaper is a factor, since transportation costs are substantial (App. 865, 869-870).

At the time of its acquisition of International, Greater Buffalo was the most successful and efficient comic supplement printer, largely because of the technical and innovative skills of its president, Koessler. It owned no feature rights of its own, but did some printing for the feature syndicates, though most of its sales were direct to newspapers. In 1954, the last full year before the acquisition, Greater Buffalo had sales of about $8.5 million (P-138, para. 15, App. 1867). Its plants were then located in Buffalo and Dunkirk, New York, but it was in the advanced stages of planning for a new plant in Lufkin, Texas, intended to facilitate and increase sales to southern newspapers by reducing transportation costs. The Lufkin plant was opened in 1958 (P-138, para. 20, App. 1868).

International was also a comic supplement printer, comparable in size to Greater Buffalo, but not as efficient (App. 1106; P-62, App. 1823). Its owners, the Govin family, had made no capital investment in the company after their initial loan to commence operations had been repaid (App. 1109-1110), and consistently withdrew a large portion of the profits as dividends. The dividends continued to the date of ac-

quisition as follows: $44,700 in 1953, $34,800 in 1954 and $17,400 for the first six months of 1955 (P-141, App. 1873). Although claiming a working capital deficit at the end of 1954 of about $100,000 (App. 1111), the company showed a net profit for that year of $11,000 (down from more than $70,000 in each of the four prior years)[5] and its net profit for the year in which it was acquired (during one-half of which the company was under the control of Greater Buffalo) increased to more than $88,000 (P-141, App. 1873).[6]

International, like Greater Buffalo, also had annual sales of about $8.5 million at the time of the acquisition (P-138, para. 15, App. 1867), but employed no sales force of its own as its sole source of business was King (App. 1103-1104). Since 1926, shortly after it was founded, International operated under long-term contracts with King who in turn sold the printing to those newspapers purchasing comic featurers from King (P-2-7, App. 1415-1423, 1708).

---

[5] The apparent reason for the marked decline in net income is a matter of accounting. Charged against the income of that year was a deferred fund for the 1955 vacation pay of International employees (P-54, App. 1481). At that time, International employed approximately 300 skilled workers (App. 169). In addition, costs of the proposed opening of the southern plant were to be charged against income (P-54, App. 1481). Due to these charges, International's president requested that these amounts be excluded for purposes of determining his salary, which was based upon net income before the deduction of interest on notes payable to the shareholders and depreciation (*id.* at 1480-1481).

[6] At the time of the acquisition, International had practically no debt and its daily cash balance for the year of acquisition averaged approximately $130,000. (P-1, App. 1412, see also P-134, App. 1587-1588.)

Thus, International's revenues were obtained not from newspapers for which it printed, but solely from King under the contracts. The contract in effect in 1955 was cancellable upon six-months notice and permitted King to place 25 percent of its supplement printing with other printers (primarily on the West Coast) (P-1, App. 1410).

International's plants were located in Wilkes-Barre, Pennsylvania, and Peoria, Illinois (P-138, par. 8, App. 1866), the latter plant having been closed since the acquisition. In mid-1954, International's board of directors, prodded by King's recognition of the competitive disadvantage it would suffer when Greater Buffalo opened its Texas plant, authorized its president, Gorman, to develop plans for its own southern facility to be financed either by a favorable renegotiation of the King contract or by a loan (P-54, App. 1477-1478). Although King and International experienced difficulties in negotiating a long-term contract (P-54, App. 1477-1480; App. 1117-1123) and loan negotiations were not extensively pursued (App. 1118-1119), plans for a southern plant, nevertheless, went forward. By January 1955, after extensive investigations, International had focused on Sylacauga, Alabama as a proposed site. Hearst, on behalf of King, entered into a ten-year contract to purchase newsprint from a newsprint company in that area, contingent upon construction by International of a plant there (P-56, App. 1483-1485). Plans were drawn for such a plant (P-122, App. 1571-1573), and by June 3, 1955, four weeks prior to the acquisition, Gorman told the Sylacauga Chamber of Commerce

that "I can confidentially state that we are going to locate in Sylacauga * * *" (P-114, App. 1562).

King, the strongest syndicate controlling feature rights, is also the largest nonprinter selling color comic supplement printing (P-1, App. 1410-1411). In 1955, its sales of printing amounted to almost $10 million, most of which was done by International (Ex. 5G to affidavit of Elliott H. Feldman, proceedings on order to show cause, 3/20/61). Moreover, King does not sell printing merely as an adjunct to its features business; it has at all times sought to earn a satisfactory profit on its sales of printing as well as on its sales of feature rights (*ibid.*).

Although some of Hearst's subsidiary newspapers print their own color supplements, Hearst does not print for King (P-62, App. 1823). Hearst has consistently maintained, as a matter of policy, that it is not interested in getting into the printing end of the business (App. 1113). Although Greater Buffalo contended at trial that Hearst had substantial excess color supplement printing capacity (P-62, App. 1823), there was evidence that conversion of such facilities to make them significantly competitive with independent color printers in handling King's requirements was technically and economically unfeasible (P-103-106, App. 1523-1537).

In 1955, the year of the acquisition, a total of about $28 million worth of color comic supplement printing was sold to newspapers by printers and syndicates. While the record does not contain a precise breakdown of printing sales, a good picture of the relative strength of printers is given by the following break-

down by volume of printing (P-62; P-138, para. 18, App. 1868):

Comic Printer	Printing Volume (On Terms of 4-Page Sections)
The International Color Printing Company, Wilkes-Barre, Pennsylvania	27,237,658
Greater Buffalo Press, Inc., Buffalo, New York	26,843,474
Acme Colorprint Company, San Bernardino, California	5,001,714
Eastern Color Printing Company, Waterbury, Connecticut	3,681,339
Southern Colorprint, Newport News, Virginia	477,714
World Color Press, Inc., St. Louis, Missouri	753,559
Buffalo Colorpress, Inc., Buffalo, New York	3,289,032
Fort Worth Star-Telegram, Fort Worth, Texas	[7] 1,599,556
Hearst Corporation	[7] 2,956,434

Thus Greater Buffalo and International (printing exclusively for King) together accounted for more than three-fourths of the printing done by comic supplement printers for sale to newspapers which did not do their own printing. Each did more than five times the volume of the next largest printer (Computed from P-61, App. 1709-1822, P-62, App. 1823, P-63, App. 1824-1829.)[8]

[7] The figures included for Hearst and the Fort Worth Star-Telegram represent supplement printing done by them for other newspapers.

[8] Exhibit P-62 (App. 1823) was compiled by the government from figures derived from International's annual industry survey (P-61, App. 1709-1822, P-63, App. 1824-1829, P-138, par. 18, App. 1868). Greater Buffalo contended below that the relevant market should include printing done by newspapers for themselves (P-62, App. 1823). The government objected to such inclusion on the ground that, while such papers might be potential customers of the independent printers, they would not seek the printing business of other newspapers (Plaintiff's Post-Trial Brief, p. 17). Even accepting the broadest market proposed by Greater Buffalo, its

C. The Acquisition

Dissatisfied with profit levels and unwilling to make needed investments for modernization and expansion, International's owners had desired to sell the company for several years prior to 1955 (App. 1111-1112). King was offered an opportunity to buy in 1952; although Frank Nicht, King's chief executive officer, favored the idea, Hearst declined to negotiate "at any price" (App. 1112-1113). Late in 1954, Gorman, International's president, through Nicht, obtained an introduction to Koessler of Greater Buffalo (App. 1113-1114). Koessler expressed an interest in acquiring International, and discussions quickly proceeded to negotiations over the fair market value of the company's stock (App. 1114-1115).

Nicht kept himself well informed on these negotiations (P-15, App. 1432-1433, P-16, App. 1434-1437, P-19, App. 1440, P-21, App. 1441-1443, P-23, App. 1447-1458; App. 932-943). On March 25, 1955, in a memorandum to his superior, he presented the sale of International to Greater Buffalo as one of three possibilities for solving International's problems; the others were renegotiation of the King-International contract at rates sufficient to finance International's southern plant, or acquisition of International by King (P-21, App. 1441-1443). Nicht advised:

> The owners of International Color Printing Company are now quite definitely anxious to sell. *They can hardly sell without our consent and cooperation.* We have had many meetings

---

share combined with International's is nearly 42 percent (P-62, column 5, App. 1823).

among ourselves and with the representatives of ICP and Greater Buffalo Press. These meetings have up to this time involved the overall principles and not the many details.

The time has now come for us to decide what we want to do. If management prefers a carrying out of plan No. 3, [sale to Greater Buffalo] I am prepared to proceed if given a green light. Even in this event, *there is a possibility of encountering opposition in the effort to protect the interests of KFS on every conceivable point under a long-term selling contract with the prospective owners.*

Greater Buffalo Press realizes they can hardly continue purchase plans without the approval of KFS and Greater Buffalo Press has indicated they would like to talk further with me about this quite conclusively next week. [*Id.* at 1443; emphasis supplied.]

On June 13, 1955, Koessler wrote Nicht a detailed, formal letter setting forth "the provisions on which we are in agreement" (P-16, App. 1434-1437).[9] These included, *inter alia:*

1) Greater Buffalo would purchase International and assume the long term printing agreement then being negotiated by International with King;

2) Greater Buffalo and King would each continue to hold their existing accounts;

3) With specified exceptions, Greater Buffalo would grant King exclusive sales rights on all new business; and

---

[9] Koessler had sent Nicht a similar, less complete letter on June 2, setting forth "the points we discussed in New York, on which we agreed could go into a contract" (P-15, App. 1432-1433).

4) With one exception, King would give all its printing business to Greater Buffalo and International.

The letter concluded: "This contract is to be for a period of ten years" (*ibid.*).

On June 25, 1955, Greater Buffalo purchased International's stock for $575,000 (P-138, para. 16, App. 1867). Later that summer, International and King signed a ten-year printing contract, effective July 30, at substantially the same rates provided for in their previous contract. These rates had been agreed upon prior to the sale. (P-23, App. 1451; App. 1138-1139.) Eventually, in 1958, a contract designating King as Greater Buffalo's sales agent was executed by Koessler and Nicht (P-72, App. 1834-1843), but was not approved by the board of directors of either company, and never became formally effective. Notwithstanding Koessler's "understanding" with Nicht, Greater Buffalo, since the acquisition, while continuing to do most of King's printing, has taken substantial sales accounts from King (P-70).

After the acquisition, International, with financial support from Greater Buffalo, concluded arrangements for construction of a new plant in Sylacauga. The plant was opened in 1963 and is operated by Dixie Color Printing, a wholly-owned subsidiary of Greater Buffalo (P-138, para. 21, App. 1868).

D. The District Court's Decision

The district court rejected the government's contention that the acquisition violated Section 7 of the Clayton Act on two principal grounds. First, it found

that the printing of color comic supplements directly for newspapers was a different market than the printing of such supplements for syndicates engaged in the sale of both features and comic supplement printing to newspapers. It reasoned that to treat them as a single market would be to ignore "the tremendous leverage" which control of features affords the syndicates in selling such printing to newspapers (App. 1696-1697). Having so defined the markets, the court found that Greater Buffalo and International had not been in competition before the acquisition, since International printed solely for a syndicate, King (App. 1700).

Although the court expressly found that "Greater Buffalo and King engaged in active competition for the business of printing color comic supplements" (App. 1697), it made no attempt to assess the impact of the acquisition on that competition. It found that at the time of the acquisition, there was no agreement, either between King and Greater Buffalo or King and International, for a new long-term printing contract for King's business (App. 1702). It viewed King as not dependent upon International for its printing, believing that King had access to either the capacity of Hearst or other independent printers (App. 1701-1702). The court concluded, therefore, that in acquiring International, Greater Buffalo simply took a calculated risk that it could obtain King's printing, and did not obtain by the acquisition a further share of the printing market (App. 1702).

Second, the court found that, at the time of the acquisition, International was a failing company

(App. 1701). Its basis for this conclusion was that King, International's sole source of business, had been placing some business elsewhere and was threatening to increase this practice (which it could do under the six-month cancellation clause in the contract) unless International built a southern plant. The court found that International lacked financing for necessary expansion and modernization since it had a working capital deficit, its owners were unwilling to invest capital, and King was unwilling to enter into a new long-term contract at higher rates. Noting that King had refused to buy International, the court found that there was no other prospective buyer. The court also found that International became a healthy and profitable company after the acquisition because of technological improvements made possible by Greater Buffalo (App. 1702). It found further that competition from the remaining firms in the industry had increased during the fifteen years since the acquisition (*ibid.*).

Finally, the court suggested that even if there was a violation it was insufficient "to warrant a court's exercising its discretion to order a divestiture fifteen years after the occurrence of the alleged illegal conduct" (*ibid.*).[10]

---

[10] In a concluding footnote, the court indicated its view that the real offender in the case was King. It observed that the evidence strongly suggested that King had utilized unlawful tie-in practices to restrict competition with Greater Buffalo in the sale of printing. The court pointed out, however, that it was without power to impose further relief against King, under the consent judgment entered against it, in the absence of a finding of violation of any antitrust law by Greater Buffalo (App. 1704, n. 4).

SUMMARY OF ARGUMENT

The effect of Greater Buffalo's acquisition of International was that the largest and most efficient integrated printer-seller of color comic supplements increased its share of the industry's printing capacity to approximately 75 percent, and also obtained the capacity and contract right to perform most of the printing for its leading sales competitor. As a result, the leading sales competitor was denied an independent source of printing. In holding that this acquisition did not violate Section 7 of the Clayton Act, the district court defined the relevant product market in a narrow and artificial manner, considering only sales competition between the acquiring and acquired firms, while ignoring the substantial competition for sales of color comic supplement printing to newspapers between the acquiring firm and the sole customer of the acquired firm. Moreover, its artificial market definition led it to ignore the direct printing competition that existed between the acquiring and acquired firms prior to the acquisition. The district court also stated that competition has flourished in the color comic supplement printing industry since the acquisition; such competition, however, is necessarily limited in scope and does not approach the fuller competition that would exist in the presence of another independent printer of comparable size to Greater Buffalo. Finally, the court upheld a failing company defense which did not satisfy the standards this Court has announced for that defense.

The district court's view that even a finding of violation would not justify divestiture requires this

Court to determine the appropriate relief to redress the impact of this anticompetitive acquisition. This Court should direct a divestiture that will not only restore actual competition in the color comic supplement printing business, but also the potential impact on such competition existing at the time of the acquisition resulting from the acquired firm's well-advanced plans for construction of a southern plant. Specifically, effective divestiture should include not only the acquired assets, but also the Sylacauga, Alabama plant operated by a Greater Buffalo subsidiary, as the culmination of International's pre-acquisition planning.

ARGUMENT

I

The Color Comic Supplement Printing Business Constitutes a Single Line of Commerce Under Section 7 of the Clayton Act.

Both Greater Buffalo and International print color comic supplements for newspapers that do not print their own. Greater Buffalo sells its printing. International does no selling itself. All of its selling is done by King, and King rather than the newspapers has the direct buyer-seller relationship with International. The actual product produced by Greater Buffalo and International, of course, is the same. There is no difference in either the printing process or the finished product dependent upon whether the color comic supplement is sold to its ultimate user (the newspaper) by the printer itself or by a syndicate that has a contract with the printer.

The printing of color comic supplements and the selling of such printing are integral, essential and inextricably intertwined component parts of the color comic supplement printing business. The same firm may do both, as Greater Buffalo does; or the component elements may be separated, as in the case of International and King. But however a particular printing business is organized, its basic character is the same: it is engaged in producing and distributing color comic supplements for newspapers. That is the market in which both Greater Buffalo and International—the latter in conjunction with King—operate; and it is the "area of effective competition" (*Standard Oil Co.* v. *United States*, 337 U.S. 293, 299-300, n.5) in which the legality of the merger is to be determined. Cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357.

In terms of traditional Section 7 product market analysis, there are three separate but interrelated markets present in this case. Since International does no selling but only printing, and since King does no printing but only selling, the printing of color comic supplements and the selling of such printing are separate markets. In our jurisdictional statement we stressed the impact of the merger upon competition in the selling market. In the trial court, we argued not only that printing and selling were separate markets but that together they constituted a third market (Plaintiff's Post-Trial Brief, pp. 3-14). On the facts of this case, these nice distinctions seem artificial and unimportant. In evaluating the effect of a merger upon competition, one must look to the eco-

nomic realities of the industry. The relevant product market in Section 7 cases is accordingly determined by the nature of the commercial entities involved and the competition they face. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 360; *United States* v. *Continental Can*, 378 U.S. 441, 456-457.

The facts of this industry are that the merging companies are both engaged in the business of printing and distributing color comic supplements. As the district court expressly found, King and Greater Buffalo were active competitors in selling color comic supplements to newspapers (App. 1697; see p. 15, *supra*). As we later show (see *infra*, pp. 25-28), that competition was dependent upon and necessarily involved competition between International and Greater Buffalo at the production level. This single economic area—comprising the actual printing and the selling of such printing—constitutes the color comic supplement business, and is the segment of the market where the effect of the merger upon competition will be felt. It is therefore an appropriate line of commerce for Section 7 purposes.

The district court deemed dispositive, however, the fact that a syndicate's ownership of the right to sell the comic features gives it "tremendous leverage" in selling the printing of such features (App. 1696-1697). In its view, this leverage made printing for syndicates a separate market. But the fact that a syndicate may have a competitive advantage over an ordinary printer in selling printing does not make the printing the syndicate sells a different product; the printing is the same no matter for whom it is done or

through which channels it is distributed. The fact that King, in selling International's printing, may have had advantages that Greater Buffalo did not have in selling its own printing, is not inconsistent with the conclusion that Greater Buffalo, International and King were all engaged in the single line of commerce consisting of the printing and distribution of color comic supplements. It is hardly novel that certain competing firms in an industry have various advantages over others. Indeed, we know of no case in which the competitive advantages enjoyed by a particular seller have themselves been deemed to constitute a sufficient product distinction to justify treating that firm's business as a separate line of commerce.

In any event, even if the district court were correct in ruling that the printing of color comic supplements for syndicates is a separate product market, that would not preclude the existence of the broader product market upon which the government relies. Although "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325), "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance" (*United States* v. *Phillipsburg National Bank*, *supra*, 399 U.S. at 360).

II

The Effect of the Acquisition May Have Been Substantially to Lessen Competition in the Color Comic Supplement Printing Business.

A. *The Acquisition Restrained Competition between Greater Buffalo and King and Eliminated Competition between Greater Buffalo and International.*

The court's line-of-commerce error led it into the further error of analyzing the competitive effects of the acquisition solely in terms of competition between Greater Buffalo and International. It is well-settled that the competition which Section 7 seeks to preserve is not merely that between the acquiring and acquired firms. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317; *United States* v. *DuPont & Co.*, 353 U.S. 586, 589-593. In this case the competition most substantially and dramatically lessened by the acquisition was between Greater Buffalo and King in the sale of comic supplement printing, which was a vital aspect of the printing business.[11] In acquiring International, Greater Buffalo not only increased its share of color comic supplement printing to approximately 75 percent (see p. 11, *supra*),

---

[11] Paragraph 27 of the amended complaint, charging a Section 7 violation, alleged that competition between Greater Buffalo and International was eliminated. Paragraph 30(d), however, which described the effects of all the violations charged, alleged more generally that "competition in the printing and sale of color comic supplements has been suppressed." The government's trial brief emphasized the "combined printing and selling of supplements" as an appropriate line of commerce, and the lessening of competition between Greater Buffalo and King (Plaintiff's Post-Trial Brief, pp. 6-14, 17).

but also gained the almost certain right to print for King, its principal selling competitor.[12]

As a result of the acquisition, King has become dependent upon Greater Buffalo for most of the printing which it sells in competition with Greater Buffalo, and price competition between the two necessarily has been restricted. King, seeking a profit from printing sales, obviously cannot quote a price below that which it pays Greater Buffalo for printing; Greater Buffalo, in seeking to take accounts from King, has no incentive to bid below the price King pays it for the work. It is no answer that Greater Buffalo has taken accounts from King since the acquisition; existing competition between them, effectively restricted to sales at a price higher than Greater Buffalo charges King for printing, is not the fuller competition that could exist if King had an independent printing source.[13] Cf. *United States* v. *Container Corp.*, 393 U.S. 333, 337. It can hardly be supposed that either would often be inclined to compete so vigorously with the other as to jeopardize a mutually valuable customer-supplier relationship.

---

[12] The court found that Greater Buffalo, in acquiring International, did not acquire an additional share of the market because it had no assurance that King would continue to do business with International (App. 1701-1702). While Greater Buffalo may not have had a legally enforceable right to King's business following the acquisition, it certainly—in view of Koessler's letter to Nicht memorializing an agreement that Greater Buffalo would assume the new contract then under negotiation between International and King (P-16, App. 1434-1437)—had high and justifiable hopes of obtaining that business.

[13] See, *e.g.*, App. 1234-1236; P-135, App. 1589.

But Greater Buffalo does retain the option to disregard this relationship, when it feels it desirable to do so, by using its dominant position in printing to cut sharply into King's share of the market for sales.[14]

---

[14] Nicht, frustrated in his post-acquisition efforts to finalize an agreement with Koessler to protect King from competition from Greater Buffalo, came to recognize clearly King's disadvantage by reason of its having become dependent on Greater Buffalo for printing. He wrote his superior in June 1957:

> I am not the least bit sanguine about the kind of a deal that can eventually be worked out with Mr. Koessler. There is every evidence that he wants to stall as long as possible. He is sitting pretty. I think we have been too conciliatory with Koessler and it may be that is likely to be the procedure because we can only lead from weakness. [P-102, App. 1521].

In the same letter he proposed that King acquire its own color supplement printing capacity:

> Even if it cost money to do this and diminished profits, wouldn't that be better than the eventual loss of most, if not all, of our readyprint business?
>
> * * * *
>
> The Syndicate which for more than a quarter of a century has been number one in the readyprint field is now at best number two, and quite helpless. Newspaper history clearly emphasizes the difficulty, in fact hopelessness of regaining a lost position. There is plenty of current evidence to substantiate this.
>
> If Koessler, because of what he has done the past few years, were to be attacked, in my opinion he would lose, but there is the danger, I suppose, of our becoming an accessory. Here is another reason why I think that if we were in the readyprint field with plants of our own it would restore a competitive aspect and certainly that wouldn't be discouraged in Washington [*id.* at 1521-1522].

In addition to the restriction of price competition, the acquisition also inevitably eliminated or weakened product quality and incidental service competition between Greater Buffalo and International. As long as King had an independent source of printing, there was constant pressure on each of those two companies to match or better the quality of the other's product and services. With the merger, however, the product and services being offered by Greater Buffalo and King originate from the same source; there is no reason now for the two printers to compete against each other in these important aspects of the business.

Analysis of the relationships among Greater Buffalo, King and International prior to the acquisition discloses the presence of certain important pressures on International which contributed to the existence of vigorous competition between Greater Buffalo and King and also between Greater Buflalo and International. These competitive pressures did not survive the merger. First, there was pressure on International flowing from its dependence upon King as its only customer. International's well-being turned upon the ability of King to underbid Greater Buffalo for sales of printing to newspapers, for only an increase in King's sales could lead to an increase in International's business. A second pressure on International stemmed from the fact that King was not inextricably tied to International for its printing. The contract between the two concerns allowed King to place up to 25 percent of its business with other printers (P-1, App. 1410) and was also cancellable on

six months' notice. Thus, in a very real sense, International was under a constant threat of losing printing business to Greater Buffalo.[15]

At the trial, Gorman of International conceded that his firm and Greater Buffalo competed on a production basis, and that he feared Greater Buffalo would take business away, but he maintained that this competition did not extend to sales ([illegible] App. 1138, 1141-1142, 1150-1151, 1237).[16] But such distinction between production and sales functions is not tenable in an industry in which one dominant firm was an integrated printer-seller, and the only comparably large printer was integrated by exclusive contract with the leading sales firm. The competitive pressures on International were applied directly by King, which depended upon production efficiency by International to support it in its sales competition with Greater Buffalo. King's Nicht constantly pressured International to match Greater Buffalo's production flexibility (App. 1105-1108) and did, at one point, threaten to take its printing elsewhere unless International constructed a Southern plant to meet the competition of Greater

---

[15] Nor was the competitive squeeze all in one direction. Although its overall efficiency did not match Greater Buffalo's, International possessed considerable expertise of its own and actually enjoyed an advantage in some areas (App. 1106, 1181, 1214-1215; P-120, App. 1568-1570. See also P-110, App. 1544), including the printing of small runs (App. 1265).

[16] Gorman twice made clandestine visits to Greater Buffalo plants, attempting to acquire insight into Greater Buffalo's know-how (App. 1106-1108, 1136-1138). In negotiations with International's labor union, he continually referred to Greater Buffalo as his greatest competitor (App. 272-276).

Buffalo's proposed expansion in the Southwest (App. 1108-1109, 1141-1142; P-12, App. 1425-1427, P-53, 1474-1477, P-54, App. 1477). On numerous other occasions Nicht induced International to cut its prices to meet competition (App. 1105), and, not long before the acquisition, King transferred three substantial runs from International to Greater Buffalo because of price and threatened to transfer more (App. 933-934, 985-986, 987, 1020-1023, 1032-1035, 1043-1044; P-13, App. 1427-1428).

With the acquisition of Greater Buffalo by International, the healthy competitive pressures on International described above have been either eliminated or sharply reduced. Because Greater Buffalo now controls approximately 75 percent of independent color comic supplement printing, King has no viable alternate source of supply.[17] This absence of alternatives, as we have noted, severely limits the scope of competition which can exist between Greater Buffalo and King for sales of color comic supplement printing to newspapers. Newspapers who buy such printing lost some of the ability to play off those two firms against each other that they had when King had its printing done by International, which was a direct competitor of Greater Buffalo.

The effect of the acquisition has been to combine in a single firm approximately 75 percent of all color comic supplement printing. The merging firms, Greater Buffalo and International, were competitors

---

[17] The post-acquisition contract between King and International, unlike its predecessors, was not terminable on six months' notice (App. 1225-1226).

of each other in any realistic sense of the term. The share of the market that Greater Buffalo obtained far exceeds the market shares this Court has deemed sufficient to establish a violation of Section 7 in its previous merger cases. *Philadelphia Bank* (30 percent); *Nashville Bank* (38.4 percent); *United States* v. *Phillipsburg National Bank,* 399 U.S. 350 (24 percent). Indeed, Greater Buffalo's share of the color comic supplement printing business that resulted from this acquisition approaches the 87 percent of the market that was held sufficient to establish monopoly power in *United States* v. *Grinnell Corporation,* 384 U.S. 563. Moreover, even in the broader printing market for which Greater Buffalo argued below, the combined Greater Buffalo-International market share would be 42 percent (P-62; see p .11, n. 8, *supra*)—a figure higher than the percentages involved in all previous Section 7 cases. In terms of market shares alone, the effect of this acquisition may have been substantially to lessen competition.

B. *The Anticompetitive Effects of the Acquisition Have Not Been Eliminated or Significantly Mitigated by Subsequent Events.*

As we have shown, the restriction of competition between Greater Buffalo and King and the elimination of competition between Greater Buffalo and International constitute anticompetitive effects that violate Section 7. The factors the district court relied on for its conclusion that the acquisition was not likely to—and, in fact, did not—have anticompetitive effects do not support that conclusion.

The district court stressed that the modern printing facilities of many newspapers enable them to print

their own color comic supplements should the cost of independent printing become excessive and that the excess printing capacity of the newspaper industry—in part due to the recent demise of many newspapers—kept entry barriers in the color comic supplement printing industry low (App. 1693-1696). Presumably, these observations formed, at least in part, the basis for the court's ultimate conclusion that despite the acquisition, unfettered competition in the sale of color comic supplement printing prevails (App. 1702). On close analysis, however, neither of these factors—the readiness of newspapers to print their own supplements and absence of entry barriers—shows the existence of unfettered competition.

While many newspapers can do their own supplement printing, and this consideration may restrain Greater Buffalo from raising its prices to a point where many of its customers would find it economical to do so, Greater Buffalo, in the absence of other strong independent printers, faces no competition at prices below that point. The record shows that color comic supplement printing requires exacting mechanical techniques performed by specially trained personnel and that independent printers specializing in supplement printing and handling a high volume of business can produce a high quality product more economically than most newspapers (App. 863-864; see also App. 919-920).[18] Thus, the threat that newspaper

[18] Two-thirds of all color comic supplement printing is done by independent printers (P-62, App. 1823).

customers will do their own printing—while admittedly a significant factor for Greater Buffalo to deal with—is not a substitute for the vigorous competition which would exist were there other independent printers also capable of achieving economies through specialization and bulk production.[19]

As far as the absence of barriers to entry on account of excess printing capacity is concerned, it may be that individual newspapers or those wishing to become independent printers would have no difficulty in finding printing capacity.[20] Even in this situation,

[19] Greater Buffalo stresses the claim—made by Koessler in his testimony at trial (App. 1055)—that it has not raised its prices since the acquisition and that therefore it is clear competition has continued or increased in the industry. Motion to Affirm, p. 8. It is unclear, however, what the true significance of this claim is. On the one hand, Koessler claimed that Greater Buffalo absorbed an average 3 percent annual increase in labor costs while holding the price line (App. 1055, 1090-1091), but cost increases appear to have been passed on to its customers. Greater Buffalo's treasurer testified that the company's printing contracts are based on a formula whereby newspapers are charged separately for various cost components—*e.g.*, preparing plates, ink, etc. (App. 240-241, 253). Koessler conceded that the price of newsprint was passed on to its customers (App. 1091). Finally, Gorman testified that ,since the acquisition, International has been able to charge King more under its contract because of its improved bargaining position (App. 1227-1228; see also P-133). The contract specifically provides for passing on increased newsprint and labor costs and leaves the rate for new business open to negotiation (P-23, App. 1450).

[20] Of course, it is by no means clear that much of the printing capacity made available through the demise of various newspapers could be economically adapted to fit the special

however, the possibility of potential competition is not an adequate substitute for actual, existing competition. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 260-261 (1960). But in addition to obtaining printing capacity, new independent printers must match the efficiency and skill of the existing independent printers to compete effectively. The concentration of 75 percent of the independent color comic supplement printing business in one firm, which resulted from this acquisition, is likely to increase the difficulties new entrants would have in becoming significant competitors of Greater Buffalo.[21] See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1356-1358 (1965); *Federal Trade Commission* v. *Proctor & Gamble Co.*, 386 U.S. 568, 578-580.

The district court also stressed the fact that, following the acquisition, Greater Buffalo had greatly improved the facilities of the International plant and that as a result International has been able to operate profitably (App. 1702). Greater Buffalo, in its Motion to Affirm, pp. 7-8, also cites the increased

---

requirements of color comic supplement printing. Cf. discussion at p. 10, *supra;* P-103-106, App. 1523-1537.

[21] The district court pointed to the continued existence of the market's remaining independent printing firms as evidence of the absence of any anticompetitive effect flowing from the acquisition (App. 1702). But the market shares of these firms, small though they are, still apparently reflect local advantages conferred by the factor of transportation costs (see App. 917-919, 1214-1216). They are of little significance in the national color comic supplement printing market. See Bok, *op. cit. supra*, 74 Harv. L. Rev. at 274-278.

efficiency of International and claims that as a result competition has flourished as the syndicates now have access to a better product and can compete more effectively with Greater Buffalo. There are two answers. First, as we show in Part III, *infra*, pp. 33-35, it is by no means clear that International would have been allowed to stagnate had it not been acquired by Greater Buffalo. Whether or not International would have attained in the same period of time the increased efficiencies which followed the acquisition had its ownership remained independent from Greater Buffalo,[22] it seems likely that the company would have thrived and continued to compete with Greater Buffalo. Second, although competition between King and Greater Buffalo may actually have increased at certain levels as a result of the improvement of International's facilities, it is still not, as we have noted, *supra*, pp. 23-24, the type of fuller competition that would exist if King had an independent source of printing.

---

[22] This is not to argue that increased efficiencies flowing from an acquisition may not point towards legality where anticompetitive effects are marginal. Turner, *op. cit. supra*, 78 Harv. L. Rev. at 1331-1332. But here, direct competition has been eliminated at one level (production) and a floor placed on competition at another (sales). Both involved "horizontal" relationships to Greater Buffalo, in which category economic justification for restraints is inherently more difficult. *Id.* at 1320-1322. Where the choice is between efficiency and competition, Congress has chosen the latter. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 344; *Federal Trade Commission* v. *Proctor & Gamble Co.*, 386 U.S. 568, 580.

III

Greater Buffalo Did Not Establish a Failing Company Defense.

An acquisition that would otherwise violate Section 7 may be permitted if the acquired firm is a "failing company," that is, if its resources were so depleted at the time of acquisition and its prospects for rehabilitation so remote that "it face[d] the grave probability of a business failure" (*International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655) and if there was no other prospective purchaser for it (*Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138). The failing company defense in this case met neither requirement.

A. The district court concluded that International was failing at the time of its acquisition because it had a working capital deficit,[23] its owners wished to sell rather than make the capital investment necessary to permit modernization and expansion, financing of such expansion had not been obtained from other sources, and King, its sole customer, was threatening to place some of its business elsewhere (App. 1701). The court, however, overlooked the consistent profitability of the company (including a substantial increase in profits in the year of the sale),

---

[23] The appellees did not explain the basis on which International determined this deficit to be in excess of $100,000 at the time of acquisition (App. 146, 1111; P-141, App. 1873). A virtually debt free firm with considerable assets (see App. 169) cannot be regarded as failing solely because its sole customer is dissatisfied with its performance (see n. 6, p. 8, *supra*, and accompanying text).

and its continued ability to pay substantial dividends to its owners (P-141, App. 1873). Notwithstanding some technological obsolescence, International was the largest volume printer of color supplements (P-62, App. 1823) and King had not invoked or threatened to invoke the six-month cancellation provision in its contract (App. 1225-1226). Moreover, expansion plans were being actively pursued even without assured financing (see p. 9, *supra*).

This is scarcely the picture of a business facing imminent collapse. There is little doubt that International's growth and development had stagnated by reason of the owners' insistence on high dividends to the exclusion of reinvestment of profits, and that the owners preferred a profitable sale to the commitment of capital for needed expansion and modernization (App. 1110-1112). But it is equally clear that this still-profitable concern was an important competitive force in color supplement printing, performing vital services for its sole customer, King. Compare *United States* v. *Third Nat'l Bank in Nashville*, 390 U.S. 171, 175-176, 183.

Indeed, International's failure was hardly possible so long as King remained dependent upon International for printing, and had the power to prevent it. For nearly 30 years, King had relied upon International to print substantially all the color supplements it sold. Nicht's contemporaneous memoranda make clear that King followed closely the Greater Buffalo-International negotiations; the acquisition was not consummated until Nicht had a written commitment from Koessler that International would continue to

print for King, and King's market position would be maintained (P-21, App. 1441-1443, P-23, App. 1447-1458, P-15, App. 1432-1433, P-16, App. 1434-1437).[34] Until such assurance was given, Nicht still considered either acquisition by King or renegotiation of the printing contract at rates adequate to finance International's southern expansion as viable alternatives (P-21, App. 1441-1443). King was in no position to permit any disposition of International which did not protect its long-term interests; in those circumstances it neither could nor would have permitted International to fail.

B. In any event, the failing company defense is inapplicable unless the acquiring company is "the only available purchaser." *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138. King is the only prospective purchaser, other than Greater Buffalo, to which International was ever offered. But there are several smaller color comic supplement printers in the industry and acquisition by any one of them would have been substantially less anticompetitive (P-62, App. 1823). Nothing in the record indicates that these firms, or any others, were approached by International. Indeed, although the owners were apparently

---

[34] The district court did not view the Koessler letters as evidence of conspiracy between Greater Buffalo and King, apparently on the ground that Koessler was actually misleading Nicht as to his intentions to reach an agreement (App. 1698). But for present purposes that consideration is irrelevant, since King, relying on Koessler's promises, obviously believed that its interests were protected in the Greater Buffalo acquisition, and therefore was not required to undertake other steps to finance the expansion of International.

willing to sell as early as 1952 (App. 1112-1113), there is nothing to show that International's availability was even made known generally to the trade. In these circumstances, there was no basis for the district court's finding that "no other person or corporation was interested in acquiring International * * *" (App. 1701). The finding reflects an erroneous legal standard of what the defense requires (see *Nashville Bank, supra*)—a defense that has a "narrow scope" (*Citizens Publishing Co., supra*, at p. 139).

The burden of establishing the failing company defense "is on those who seek refuge under it." *Citizens Publishing Co., supra, at* 138-139. Greater Buffalo did not satisfy that burden.

IV

Divestiture of Both International and Dixie Color Is Necessary to Restore Effective Competition.

The Court has carefully considered the question of relief in antitrust cases because the public benefits of successful litigation may be entirely lost if the decree is inadequate. *United States v. Du Pont*, 366 U.S. 316, 322-324. Although normally the district court has the preliminary and primary responsibility to fashion a remedy, see *Du Pont, supra*, 366 U.S. at 323, the district court in this case has already indicated its view that, even if the acquisition violated Section 7, to order divestiture fifteen years later would be inappropriate (App. 1702).[23] Accordingly, if this Court

[23] Of course, the passage of time in itself is no barrier to divestiture of stock acquired in violation of Section 7 of the Clayton Act. See *United States* v. *Du Pont*, 353 U.S. 586.

agrees with the government that the acquisition was illegal, it should also hold that divestiture is necessary and should state the general contours that the divestiture order should have.

"Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act * * * is involved" (*Du Pont, supra,* 366 U.S. at 329-330). "[C]omplete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7" (*id* at 328). See, also, *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 189; *Schine Chain Theatres* v. *United States,* 334 U.S. 110, 127-129; *United States* v. *Grinnell Corp.,* 384 U.S. 563, 578, 580. Divestiture is necessary here because it is the only remedy that will accomplish the three-fold objectives of the suit: (1) it terminates the violation, (2) it deprives the offender of the fruits of its offense, and (3) it breaks up the illegally acquired market power. *Schine Theatres, supra.*

Effective relief in this case—which should create a viable independent color comic supplement printer capable of providing King with an alternate source of printing from Greater Buffalo—requires divestiture[38] of both the assets owned by International at

---

[38] Divestiture in this case will also trigger the provisions of the Hearst consent decree (App. 522) empowering the court to require King to quote separately its prices for feature rights and printing, thus effectively preventing anti-competitive tying agreements.

[Continued on next page]

the time of the acquisition and the Sylacauga, Alabama plant planned by International, but constructed and operated after the acquisition by Dixie Color Printing Corp., a Greater Buffalo subsidiary. International planned its Sylacauga facility under the insistent prodding of King, which well recognized the competitive threat to its southern business posed by Greater Buffalo's preparations for a plant in Lufkin, Texas (App. 1108, 1141-1142; P-12, App. 1425-1427, P-13, App. 1427-1430, P-22, App. 1443-1446, P-52, App. 1473-1474, P-53, App. 1474-1477). It is equally clear today that no prospective purchaser of International under a divestiture order could hope to be competitive in the South if Greater Buffalo were permitted to retain two plants in that area.

There is a precedent for divestiture of the Alabama plant in *United States* v. *Aluminum Co. of*

The government agreed to the somewhat unusual conditional decree against Hearst in recognition of existing competitive realities. So long as Greater Buffalo controls King's printing as a result of the International acquisition, a requirement that King quote a separate price for printing would substantially reduce any ability King now retains to compete effectively for color supplement printing sales.

Greater Buffalo has consistently suggested (Post trial brief, pp. 3-17; App. 1683-1690; Motion to Affirm, p. 13) that the government acted improperly in negotiating this decree inasmuch as this case is the result of complaints directed at King's illegal tie-in activities. But the government had no interest in forcing protracted litigation upon a defendant that was willing to ~~accept~~ accede to a judgment that preserved the court's ability to fully deal with industry-wide restraints at issue in a continuing trial. The government properly pursued additional violations uncovered while investigating the practices that first drew its attention to this industry.

America, 247 F. Supp. 308 (E.D. Mo.), affirmed, 382 U.S. 12. In that case, the district court ordered divestiture of a plant constructed after an acquisition in violation of Section 7, where the plant had previously been planned by the acquired firm. In this case, the Alabama plant was conceived of and constructed after the acquisition as a part of the International operation. International acquired, modified and its employees installed the equipment for the new plant (App. 156-160, 175-179, 180-182, 1197-1198, 1203, 1212, 1218-1219; P-119, App. 1567, P-128, App. 1578-1580, P-132, App. 1585-1586) and International's Gorman served as president of Dixie Color—the corporation created to operate the plant (P-126, App. 1574-1577)—for more than three years (P-127, App. 1859, see also P-115, App. 1563-1564) while International's supervisor became Dixie Color's general manager (App. 56-59, 1121-1212, 1219-1220). Gorman conceded at trial that for at least some period of time after the acquisition, it was contemplated that International would operate the new plant as part of the International operation (App. 1184, 1193, 1199). Finally, after the plant became operative, King transferred almost enough runs from International to Sylacauga to meet International's minimum estimates for a profitable operation (App. 244, 1213, 1217).

Although Koessler testified that Dixie Color was the fruition of Greater Buffalo's own plans for a plant in the Southeast, he conceded that his preference had been for the Chattanooga area and that through the persuasion of Gorman he reluctantly ac-

quiesced in the Sylacauga location (App. 874-876; see also App. 1120-1122). In any event, it is hardly probable that Greater Buffalo would have proceeded with any expansion plans in the area if International had been able to go forward with its plans and locate in the region first. Indeed, when Koessler first discussed with Gorman the availability of International for sale, he expressed interest in International's "southern section" (App. 1153-1154), strongly suggesting that a primary motive for the acquisition was elimination of International's planned expansion as a competitive threat.

Against this background, we submit that the Sylacauga plant was more the realization of International's plans than Greater Buffalo's, and must be viewed as a fruit of the unlawful acquisition. Moreover, its divestiture is essential to restore effective competition among color comic supplement printers.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for the fashioning by the district court of appropriate relief as indicated in this brief.[27]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

DANIEL M. FRIEDMAN,
Deputy Solicitor General.

SAMUEL HUNTINGTON,
Assistant to the Solicitor General.

GREGORY B. HOVENDON,
LEE A. RAU,
ELLIOTT H. FELDMAN,
Attorneys.

MARCH 1971.

---

[27] In addition to divestiture, it may be appropriate to include other provisions, such as one designed to prohibit after divestiture—at least for a period—Greater Buffalo from printing for King to assure that the purchaser of the divested assets will be in a position to obtain sufficient business to operate profitably (see App. 834-837). The selection and formulation of those provisions is for the district court to decide in the first instance.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 417788 333